Bob's Big Boy Family Restaurants, a Division of Marriott Corporation *and* Local No. 37, Bakery & Confectionery Workers International Union of America, AFL-CIO. Case 31-CA-8128

November 3, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 28, 1978, the National Labor Relations Board issued its Decision on Review in the underlying representation case in this proceeding[1] in which it found that a contract between Respondent and Bob's Employees' Association (the Association) was not a bar to the petition filed by the Charging Party (the Union) because it contained a "members only" provision, and because the petition was filed in a timely fashion according to the contract's effective date appearing on the cover page of the contract distributed to employees.

On May 9, 1978, the impounded ballots from an election conducted on January 17, 1978, were opened and the tally of ballots revealed that a majority of employees voting in the election had voted for the Union. Accordingly, on May 17, 1978, the Union was certified as the exclusive bargaining representative of the employees in the appropriate unit.

Commencing on or about June 7, 1978, and at all times thereafter, Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. After this refusal to bargain, on September 29, 1978, the Board, on the basis of an 8(a)(5) complaint and the General Counsel's Motion for Summary Judgment, issued an Order compelling Respondent to recognize and bargain with the Union.[2]

Thereafter, Respondent petitioned the United States Court of Appeals for the Ninth Circuit to set aside the Board's Order. The General Counsel cross-applied for enforcement of the same Order. On July 28, 1980, the court denied enforcement of the bargaining order and remanded the case to the Board for further consideration.[3] The court found that it was unable properly to review the Board's finding that Respondent was "estopped" to deny the election petition was timely filed because the Board had not specifically indicated whether its estoppel rationale was based on the theory of equitable estoppel or instead was "a new exception" to the contract-bar rules "based upon some other principle." The court also concluded that the Board had departed from its own precedent by considering extrinsic evidence in construing the meaning of the alleged "members only" provision of the contract under consideration here. In addition, the court found it difficult to distinguish the instant case from *H. L. Klion, Inc.*, 148 NLRB 656 (1964), where the Board held that an ambiguous wage increase provision was not an unlawful members-only provision when read in the context of the contract's union-security clause. The court also remanded this portion of the case so that the Board could exclude extrinsic evidence, and consider its precedent, e.g., *H. L. Klion*, and explain why that precedent should be disregarded if the Board wished to reach a contrary result on this issue.

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position with regard to the issues raised by the remand. The Union filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire case in light of the court's decision, which we accept as the law of the case, and the statement of position on remand, and we now enter the following findings.

1. In its original Decision the Board found the contract between Respondent and the Association was not a bar to the Union's petition. The contract between Respondent and the Association was apparently effective from December 11, 1974, to December 31, 1977. However, the contract distributed to employees by the Association, with Respondent's knowledge, contained on its cover the dates "January 1, 1975 to December 31, 1977." Thus, the petition filed by the Union on October 13, 1977, was untimely as to the dates in the text of the contract, but timely as to the cover dates. The Board reasoned that these conflicting dates created a situation from which the correct time for filing a petition could not be determined, and stated that Respondent was "estopped" from asserting the contract as a bar to the Union's petition. For the following reasons, we reaffirm that conclusion on remand.

The Board's contract-bar rules are designed to balance the twin goals of employee freedom of choice and industrial stability. For example, contracts may bar a representation petition for up to 3 years.[4] This contract-bar rule provides employee or

[1] 235 NLRB 1227.
[2] 238 NLRB 700.
[3] 625 F.2d 850.

[4] See *General Cable Corporation*, 139 NLRB 1123 (1962), which enlarged the period of the basic contract-bar rule from 2 to 3 years.

union petitioners the opportunity to file petitions at reasonable, identifiable times to change or eliminate the employees' bargaining representative if they so desire, and at the same time affords a reasonable period of stability for the contracting parties and employees. The Board has also provided for a "window period" during which petitions may be filed to be timely with respect to an existing contract.[5] And when an employee, or other petitioner, seeks to determine the proper time to file a representation petition, it is axiomatic that one would look first to the existing contract between the employer and the union to determine the appropriate dates for filing such a petition.

Here, Respondent and the Association signed a collective-bargaining agreement, an original of which Respondent locked in its vault. The Association distributed copies of the contract to employees, and Respondent knew of this distribution. However, the cover page of this contract indicated dates which differed from the effective and expiration dates contained in the 29th provision at the end of the contract originally signed.[6] As noted, the Petitioner's representation petition was filed within the appropriate "window period"[7] according to the dates stated on the front of the contract distributed by the Association, but was 2 days late under the same rule according to the effective date on the inside of the contract.

In these circumstances, we believe the contract urged by Respondent as a bar to the petition should not operate to deny its employees the opportunity to vote on union representation. In answer to the court, we note that, in stating in its original Decision that Respondent "should be estopped from asserting contract bar," the Board did not intend to use the formal legal doctrine of "equitable estoppel" in denying Respondent's claim contract bar. Rather, the Board analyzed the factual situation presented by the conflicting dates of the contract which was given to the employees, and concluded that barring the petition in these circumstances would not effectuate the purposes of the Act.

Also in response to the court, we note that the Board in its Decision did not attempt to apply a "new exception" to its contract-bar rules. Rather, it sought to effectuate its rule that, where parties to a contract create a situation in which a petitioner cannot clearly determine the proper time for filing a petition, the ambiguity does not inure to the benefit of the parties but instead means that the petition will not be barred.[8] Thus, as was indicated in *Cabrillo Lanes supra*, where an employer and a union have created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition, such a situation does not stabilize labor relations. This is the situation that obtains here. Based on this finding the Board in the earlier proceeding concluded that the contract should not operate as a bar. We reaffirm that finding and conclusion here.[9]

2. As to the alleged "members only" provision, we accept as the law of the case the court's finding that extrinsic evidence must be excluded from our consideration of this issue. In light of this holding, and the court's opinion that our previous Decision was inconsistent with Board precedent,[10] we must conclude that the collective-bargaining agreement involved here does not contain an illegal members-only provision. However, we still find the contract is not a bar to the petition, for the reasons stated above.

Accordingly, we affirm our earlier Order requiring Respondent to bargain with the Union[11] and restate it herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bob's Big Boy Family Restaurants, a Division of Marriott Corporation, Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 37,

[5] See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962), modifying *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958).

[6] The "original" contract locked in Respondent's vault did not contain the "cover page" of the contract distributed to employees.

[7] See fn. 5, above.

[8] See, e.g., *Delto Company, Ltd. d/b/a Cabrillo Lanes*, 202 NLRB 921 (1973). Compare, e.g., *Thiokol Corporation*, 215 NLRB 908 (1974); see, generally, *Union Fish Company*, 156 NLRB 187 (1965).

[9] Although we do not rely on the doctrine of equitable estoppel in reaching our result here, we note that the four elements necessary for invoking the doctrine—knowledge, intent, mistaken belief, and reliance—are present here. Thus, as more fully stated above, Respondent knew of the Association's circulation of the misleading document, and had a duty, with the Association, not to create an ambiguous situation or at the very least to attempt to clear up the ambiguity. The affected Union could rely only on the facts presented, which it did, believing that the petition was timely filed.

Finally, in addressing the issue raised by the reviewing court "whether it was the attorney who detrimentally relied upon the printed contract's cover dates in determining when to file the election petition and whether that reliance was reasonable," 625 F.2d at 854, we note that there is nothing in the record to indicate that the attorney saw *any* contract prior to his filing the petition, or that the attorney did other than ministerially file the petition on instructions of the Union as appears from the face of the petition. In any event, it is not the Union's right per se to file a petition that is at issue. The paramount concern is with employee rights.

[10] *H. L. Klion, supra*. In that case, the Board found that an ambiguous wage provision of a contract, when read in the context of the union-security provision, was not an unlawful provision.

[11] 238 NLRB at 702-703.

Bakery & Confectionery Workers International Union of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its facilities located at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, excluding all other employees, truckdrivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

I concurred in the Board's original Decision on Review in the representation case in this proceeding solely on the basis that the contract between Respondent and the Association included a members-only provision which invalidated it for contract-bar purposes.[13] Like my colleagues I accept as the law of the case the reviewing court's finding that the health benefits provision at issue here is not on its face an invalid members-only clause. However, as before, I cannot agree with the majority's conclusion that, in any event, the dates on the cover of the contract circulated to employees created such confusion that the contract could not operate as a bar to the Union's petition under our contract-bar rules.

It has long been Board law that, when contracts of more than 3 years' duration are involved, the date to measure the appropriate time for filing a petition is from the third anniversary of the start of the contract.[14] The effective date of the contract here—December 11, 1974—can be readily ascertained from the body of the contract. Thus, in clear language embodied in a substantive provision the agreement sets forth the date on which it was signed and its duration. This provision and the date of signing are not buried away in the middle of the contract; rather they appear at the end of the contract near the signature page. It stretches the imagination to believe that anyone receiving a copy of such a contract could not peruse its contents and quickly locate the operative dates.[15] The contract does not create confusion; it is precise in its terms. Accordingly, I would find it to bar the Union's petition, and would dismiss the complaint.[16]

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[13] See 235 NLRB at 1228, fn. 11.

[14] *General Cable Corporation*, 139 NLRB 1123 (1962); *Union Carbide Corporation*, 190 NLRB 191 (1971).

[15] I cannot understand how the majority's explanation about the Union's attorney's involvement in this case justifies a different result. If the attorney read the contract, he should have seen the controlling provision. If information were conveyed to him over the phone or by other method, he should have asked what the date of signing was.

[16] *Cabrillo Lanes, supra*, extensively relied on by the majority, is factually dissimilar. In *Cabrillo Lanes*, two contracts, each purportedly agreed to by the employer and the union, were in evidence, but each contained a different termination provision. In such circumstances, the Board properly held that such a difference "created a situation which precludes a clear determination by a potential petitioner of the proper time for filing a new petition." 202 NLRB at 923. Here, we do not have to determine which of two contracts is controlling. Rather, the agreement containing the alleged confusing cover dates contains the *same* contractual provisions as the one signed by Respondent and the Association. A clear determination as to when to file a petition could be made simply by reading the contract.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 37, Bakery & Confectionery

Workers International Union of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed at our facilities located at 830 Sonora Avenue, Glendale, California, and 611 Sonora Avenue, Glendale, California, excluding all other employees, truckdrivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

BOB'S BIG BOY FAMILY RESTAURANTS, A DIVISION OF MARRIOTT CORPORATION